(2)

No. 01-1191

Supreme Court U.S.
FILED
MAR 15 200[illegible]
OFFICE OF THE CLERK

In The

Supreme Court of the United States

WASHINGTON HOSPITAL CENTER

and

AETNA CASUALTY AND SURETY CO.
(now known as Travelers),

Petitioners,

v.

FLORENCE SNOWDEN

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONDENT FLORENCE SNOWDEN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD W. GALIHER, JR., ESQ.
GALIHER, CLARKE & GALIHER
401 E. Jefferson Street
Suite 101
Rockville, Maryland 20850
(301) 762-2102
Counsel of Record
for Respondent Snowden

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

35 1P
2 cl

QUESTIONS PRESENTED

A. Whether the D.C. Circuit was correct in deciding that the Benefits Review Board did not have jurisdiction of the District Director's Order, issued under §918(a) of the Longshore Act, finding a default in payment under the original 1992 award.

B. Whether a Petition for Certiorari should be granted to interpret §910(f) of the Act, and decide whether the *Brandt/Holliday* method of calculating adjustments under the Act should be overruled.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

COUNTERSTATEMENT OF THE CASE 1

STATUTORY BACKGROUND 3

REASONS FOR DENYING THE WRIT 4

I. THE D.C. CIRCUIT CORRECTLY CONCLUDED THAT THE BENEFITS REVIEW BOARD DID NOT HAVE JURISDICTION 4

II. THIS COURT SHOULD NOT GRANT JURISDICTION TO REVIEW *BRANDT/HOLLIDAY*, BEFORE REVIEW BY THE D.C. CIRCUIT 9

CONCLUSION 10

APPENDIX:

Associate Director's letter of 3/2/98 to Mackey, Esq. 1a-2a

Mackey, Esq. letter to Claim's Examiner of 6/11/98 ..... 3a-5a

District Director's Memo of 3/7/96 to Director, OWCP 6a

Aetna reimbursement check of 2/28/96 payable to Longshore Div. 7a

Benefits Review Board Decision and Order of 5/19/96 in *Suzin Bailey v. Pepperidge Farm, et al.* 8a-17a

District Director's memo of 4/27/92 to Director, OWCP 18a-19a

(undated) benefit calculation sheet payments due Snowden using *Holiday* [sic] decision 20a

TABLE OF AUTHORITIES

Page

CASES:

Suzin Bailey v. Pepperidge Farms, 32 BRBS 76 (1998) ...6, 7

Brandt v. Stidham Tire Co., 785 F.2d 329 (D.C. Cir. 1986) ..... *passim*

Bray v. Director, 664 F.2d 1045 (5th Cir. 1981) 6, 7

Holliday v. Todd Shipyards Corp., 654 F.2d 415 (5th Cir. 1981) ..... *passim*

Keener v. WMATA, 800 F.2d 1173 (1986), *cert. denied*, 480 U.S. 918 (1987) 3

Miller v. French, 530 U.S. 327 (2000) 8

Phillips v. Marine Concrete Structures, Inc., 895 F.2d 1033 (5th Cir. 1990) (en banc) 9

Providence Wash. Ins. v. Director, OWCP, 765 F.2d 1381 (9th Cir. 1985) 2

Sealand Serv., Inc. v. Barry, 41 F.3d 903 (3rd Cir. 1994) 2

Southeastern Maritime Company v. Brown, 121 F.3d 648, *reh'g en banc denied*, 132 F.3d 48 (11th Cir. 1997), *cert. denied*, 524 U.S. 951 (1998) 9, 10

Tidelands Marine Serv. v. Patterson, 719 F.2d 129 (5th Cir. 1983) 2

FEDERAL STATUTES:

33 U.S.C. §901, *et seq* 3

33 U.S.C. §908(f) 5, 6, 7

33 U.S.C. §910(f) 1, 3, 5, 8, 10

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. §914(f) 2, 6

33 U.S.C. §918(a) 3, 4, 8

33 U.S.C. §921(b)(3) 2, 4, 7

DISTRICT OF COLUMBIA STATUTES:

District of Columbia Workers' Compensation Act of 1928, 45 Stat. 600, most recently codified at 36 D.C. Code §501-02 (1973) 3

District of Columbia Workers' Compensation Act of 1979, 36 D.C. Code §501 *et seq.* 3

SUPREME COURT:

S. Ct. R. 10 10

COUNTERSTATEMENT OF THE CASE

After the Benefits Review Board's ("Board") decision of December 9, 1996 (Pet. App. 33a) had become final, the Associate Director's office, acting on behalf of the Federal Respondent, Director, Office of Workers' Compensation Programs, United States Department of Labor ("OWCP"), by letter dated March 2, 1998, notified Petitioner Aetna that cost of living adjustments under §910(f) had not been paid for the years 1995, 1996 and 1997 (Resp. App. 2a). It is, therefore, incorrect for Petitioners to allege that this was the "first annual adjustment to be assessed since Employer/Insurer resumed payments" (Pet. App. 4) after the Board's 1996 decision. Petitioners did not respond to the District Director's letter of March 2, 1998 nor a subsequent letter of June 5, 1998 until June 11, 1998. (Resp. App. 3a).

After finally responding on June 11, 1998, Petitioners refused to pay §910(f) adjustments, as required by the D.C. Circuit's decision in *Brandt v. Stidham Tire Co.*, 785 F.2d 329 (D.C. Cir. 1986) (*"Brandt/Holliday"*), Respondent Snowden then requested the District Director to issue a Supplementary Compensation Order "pursuant to 33 U.S.C. §918(a)" (Pet. 4) which ordered Aetna to pay annual cost of living adjustments calculated "in accordance with the *Holliday* decision" (Pet. p. 4), [*Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. 1981)] because Petitioners were "in violation with [sic] the Final Compensation Order issued on December 9, 1996." (Pet. App. 56a).

Petitioners then appealed the District Director's Supplementary Compensatioin Order to the Board, which reversed the District Director's Supplementary Order. (Pet. App. 14a). However, Snowden appealed the Board's

Decision and Order on Reconsideration to the D.C. Circuit which reversed the Board, and concluded "that the Board lacked the jurisdiction to review the 1998 Supplemental Compensation Order because it was a final Order unreviewable by the Board." (Pet. App. 7a). The D.C. Circuit also concluded that the District Director's Order was "manifestly an Order for the collection of defaulted payments within the meaning of §918(a)" and "notwithstanding the general grant of jurisdiction to the Benefits Review Board contained in 33 U.S.C. §921(b)(3)," that all circuits which had addressed the issue have concluded that "actions for the enforcement of orders declaring default in the payment of [installments] due under either §914(f) or any other substantive section of the [Longshore and Harbor Workers' Compensation Act] are to be brought in the district court and only subsequent thereto, by appeal to the appropriate court of appeals" citing *Tidelands Marine Serv. v. Patterson*, 719 F.2d at 129 (5th Cir. 1983); *Sealand Serv., Inc. v. Barry*, 41 F.3d 903, 907 (3rd Cir. 1994); and *Providence Wash. Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 1385 (9th Cir. 1985). (Pet. App. 11a).

THe D.C. Circuit also found that Petitioner Aetna had paid or reimbursed benefits paid to Ms. Snowden pursuant to the 1992 Compensation Order (Pet. App. 47a) "without challenging OWCP's methodology for calculating Ms. Snowden's compensation rate" until 1998, when "it relied on the Board's decision in *Bailey* which acknowledged a change of law in ruling that the *Brandt/Holliday* rule 'no longer applies to cases under the [ ] Act.' *Bailey*, 1998 WL 285563, at *4." (Pet. App. 12a). Furthermore, the D.C. Circuit also refused to decide the "*Brandt/*

Holliday" method of calculating permanent total benefits under §910(f), because of its conclusion that the Board "lacked jurisdiction to review the supplementary compensation order issued pursuant to §918a" and vacated the 1999 decision and order of the Board. (Pet. App. 14a).

STATUTORY BACKGROUND

The Longshore and Harbor Workers Act, 33 U.S.C. §901, *et seq.* ("the Act") provides workers' compensation benefits to certain types of workers who have been injured in the course of their employment. The Act was extended by amendment to the District of Columbia, by the District of Columbia Workers' Compensation Act of 1928, 45 Stat. 600, and 36 D.C. Code §501-02 (1973) which provides in pertinent part that the "provisions of the Longshoremen's and Harbor Workers Act . . . shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia irrespective of the place where the injury or death occurred." Furthermore, the 1984 Amendments to the Act did not apply to District of Columbia injuries occurring after July 26, 1982, because the District of Columbia had repealed the District of Columbia Extension of the Longshore Act, when it enacted the District of Columbia Workers' Compensation Act of 1979, 36 D.C. Code §501 *et seq.* (The D.C. Circuit has held that the District of Columbia's Longshore Extension applies only to pre-1982 injuries but not subsequent injuries. *See Keener v. WMATA*, 800 F.2d 1173 (1986), *cert. denied*, 480 U.S. 918 (1987)).

The same or similar language to the current version of 33 U.S.C. §918(a), involving collection of defaulted

payments by a filing in the U.S. District Court, has been in the Longshore Act since 1926. Section 918(a) provides a method for collection of defaulted payments by filing the Supplementary Order of the Deputy Director (herein "District Director"), declaring the amount in default (Pet. App. 55a), with the United States District Court for the District of Columbia. Section 918(a) also states: "[I]n case of default by the employer in the payment of compensation due under any award of compensation for a period of 30 days after the compensation is due and payable . . . " if such order is "in accordance with law," then "the Supplementary Order of the Deputy Director shall be final" and the District Court "shall upon the filing of the copy, enter judgment for the amount declared in default by the supplementary order."

REASONS FOR DENYING THE WRIT

I. THE D.C. CIRCUIT CORRECTLY CONCLUDED THAT THE BENEFITS REVIEW BOARD DID NOT HAVE JURISDICTION.

The D.C. Circuit concluded that the Benefits Review Board ("Board") did not have jurisdiction under 33 U.S.C. §921(b)(3) to review the District Director's Supplementary Order for Petitioners to pay defaulted payments. (Pet. App. 55a) because there was already a statutory mechanism in 33 U.S.C. §918(a) of the Act for Petitioners to challenge it. In denying the Board's jurisdiction, the D.C. Circuit determined that the Board's Order on Reconsideration (Pet. App. 14a) reversing the District Director's Default Order should be reversed, because §918(a), not

§921(b)(3) of the Act, provided both exclusive jurisdiction and a remedy for Petitioners.

In asserting herein that the D.C. Circuit was incorrect in its finding that the Board lacked jurisdiction, Petitioners urge this Court to accept the Board's erroneous conclusion that the District Director's 1998 Supplementary Compensation Order (Pet. App. 55a) was appealable to the Board because the *Brandt/Holliday* calculation method had not been previously reduced to a formal Compensation Order. However, at the time of the original Order in 1992 by the Administrative Law Judge ("ALJ") (Pet. App. 47a), such calculations were not normally done in ALJ Compensation Orders, but were routinely prepared by the District Director for the Director OWCP when an Administrative Law Judge's award of permanent total benefits was filed and served by the Director on the parties. Furthermore, the D.C. Circuit concluded that although §910(f) was not explicitly mentioned in the ALJ's 1992 Compensation Order, that this was "implicit" in light of "*Brandt/Holliday*" and because for years Aetna had paid without challenging the District Director's methodology for calculating Ms. Snowden's compensation. (Pet. App. 12a).

After the Administrative Law Judge's Order of March 18, 1992 which provided for "periodic increases . . . " (Pet. App. 47a), §910(f) calculations were made by the District Director (Resp. App. 20), and the first permanent total payments to Snowden commenced by Petitioners. Again in 1994, after the Board affirmed the Administrative Law Judge's permanent total award, and reversed and remanded to the ALJ for further findings on the §908(f) issue (Pet. App. 38a), Petitioners again

appealed the ALJ's findings on remand to the Board, and in 1996, the Board affirmed the ALJ's decision on remand. (Pet. 33a). After this Order of the Board became final, Petitioners reimbursed to the District Director accrued benefits totaling $32,027.22 (including *Brandt/Holliday* adjustments which had been paid by the Director OWCP to Snowden during the Director's appeal), for §908(f) payments which had been made to Snowden from 1992 through 1996. (Resp. App. 7a).

Petitioners assertion of a cert-worthy conflict based upon the Fifth Circuit's decision in *Bray v. Director,* 664 F.2d 1045 (5th Cir. 1981) is based on a misreading of *Bray, supra,* which is both factually and legally distinguishable. In *Snowden,* Petitioners do not dispute that the Executive Director for the District Director issued a Supplemental Order "pursuant to 33 U.S.C. §918(a)" (Pet. 2) after they improperly reduced Snowden's payments in 1998 based upon their misinterpretation of the Board's decision in *Suzin Bailey v. Pepperidge Farm, supra.* (Resp. App. 8). In *Bray, supra,* contrary to *Snowden,* there was no default declared by the Deputy Commissioner's Supplementary Order. In *Bray, supra,* the Fifth Circuit only addressed "whether an error of fact or law in a supplementary order *finding no default* is reviewable before the Benefits Review Board." *Id.* at 664 A.2d 1048 (emphasis supplied) and concluded that the Board had jurisdiction. (In *Suzin Bailey,* 32 BRBS 76 (1988), the disputed Order appealed to the Board did not involve a default but only a Supplemental Order to pay a §914(f) penalty). (Resp. App. 11).

Petitioners also cite *dicta* from *Bray, supra,* where the Fifth Circuit suggests that the Board should be given jurisdiction where an Order is "ambiguous or unclear."

However, Petitioners do not suggest in their Petition for Certiorari, how the District Director's Supplementary Order was ambiguous or unclear, and, in fact, have failed to print *both* of the Orders issued by the District Director in their Appendix (Pet. App. 6a, n. 8). While Petitioners now for the first time claim "uncertainty" about the District Director's Supplementary Order which the Board reversed, *Bray, supra,* also required that any alleged uncertainty must be such that it was "not reasonably apparent at the time of the entry of the Order." *Bray, supra.* Petitioners did not raise any claim of uncertainty before the D.C. Circuit below, nor when they appealed the Administrative Law Judge's original Order to the Board in 1992, nor again in 1996, when Petitioners reimbursed the Director's §908(f) payments (Resp. App. 7) after the Board's affirmance of Judge Rippey's subsequent Order on remand became final. (Pet. App. 33a).

Petitioners also mistakenly assert herein the existence of "a controversy" involving interpretation of a "substantial question of law and fact" in the District Director's Supplementary Order as a basis for the Board's appellate jurisdiction under 33 U.S.C. §921(b)(3). However, Petitioners also admit that this controversy was self-generated by their "default" (Pet. 6) "in the payment of compensation due under an award" (Pet. App. 8). As noted by the D.C. Circuit, this controversy and default did not occur until after "a change in law" in *Sūzin Bailey v. Pepperidge Farms, supra,* when Petitioners had reduced Snowden's compensation payments, which Petitioners had paid without any controversy since 1992. (Pet. App. 12a). Furthermore, a change in decisional law ordinarily is not regarded as a sufficient circumstance for relief of a

final judgment or order. *See Miller v. French*, 530 U.S. 327, 344 (2000).

Petitioners also assert herein that "the Longshore Act should not be interpreted so simplistically, and absolutely as to prevent substantive review of such disputes by the BRB, the forum created by Congress for that purpose." (Pet. 8). However, the D.C. Circuit found that all "the circuits to address this issue have concluded" that the proper forum specified by Congress in §918(a) of the Act for review of this type of dispute was the United States District Court, not the Benefits Review Board. (Pet. App. 11a).

Petitioners also allege herein that they did not have "timely notice" that the OWCP was applying *Brandt/Holliday*. This allegation is incorrect. While Petitioners assert that the only document in the record which mentions *Brandt/Holliday* was an undated benefit calculation sheet, which was an attachment to an internal OWCP letter dated Monday, April 27, 1992 (Resp. App. 18a-20a). It had been the longstanding consistent administrative practice of Deputy Directors ("District Directors") after all permanent total awards issued by Administrative Law Judges, to prepare and circulate to the parties the Director's written calculations of what payments are due under the award, because annual cost of living adjustments under §910(f) are automatically payable every October 1st, and are not otherwise calculated within §910(f) of the Act. While Petitioners also allege that on the face of this document there is no "record evidence that this calculation sheet was ever served on Employer-Insurer by OWCP," they also argue alternatively that, even if the information had been served, it was "erroneous, insufficient and misleading as to the law." (Pet. 9). However, assuming, *arguendo*, that

Petitioners were served with the District Director's benefit calculation, and found those calculations to be erroneous, insufficient or misleading, Petitioners nevertheless paid *Brandt/Holliday* benefits pursuant to the District Director's calculations. Furthermore, Petitioners do not state what steps, if any, they took to request that the District Director correct or clarify the alleged miscalculations, until after the Board in *Suzin Bailey, supra,* incorrectly decided that it had jurisdiction to decide that the law of the D.C. Circuit in *Brandt, supra,* had been changed by the Fifth Circuit's decision in *Phillips v. Marine Concrete Structures, Inc.,* 895 F.2d 1033 (5th Cir. 1990) (en banc).

II. THIS COURT SHOULD NOT GRANT JURISDICTION TO REVIEW *BRANDT/HOLLIDAY,* BEFORE REVIEW BY THE D.C. CIRCUIT.

Petitioners incorrectly suggest that this Court may reverse the D.C. Circuit and decide the viability of *Brandt, supra,* herein, because the District Director's 1992 benefit calculations using *Holliday, supra,* had already been overruled in the Fifth Circuit by *Phillips, supra.* However, *Phillips v. Marine Concrete, supra,* did not purport to vacate *Brandt, supra,* in the D.C. Circuit. Furthermore, the D.C. Circuit should be given the first opportunity to review *Brandt, supra,* since this Court previously refused to review the *Holliday, supra,* method of computing benefits in *Southeastern Maritime Company v. Brown,* 121 F.3d 648, *reh'g en banc denied,* 132 F.3d 48 (11th Cir. 1997), *cert. denied,* 524 U.S. 951 (1998).

CONCLUSION

This Court's rules establish that "certiorari will be granted only for compelling reasons." S. Ct. R. 10. The D.C. Circuit decision at issue here involves fact-bound applications of settled legal principles and raises no compelling issues calling for the exercise of this Court's discretionary certiorari power. It does not conflict with any other decision by any other court, and was rendered in the context of a statutory scheme which provides an adequate remedy at law. The decision is also correct, and for this reason alone, further review by this Court is not warranted.

Inasmuch as three years ago this Court declined the opportunity to review the 11th Circuit decision in *Southeastern Maritime Company v. Brown, supra,* which affirmed continuing use of the *Holliday* method of §910(f) adjustments in that Circuit, despite conflicting circuits, there is no reason for this Court to revisit the issue again now. In fact, the D.C. Circuit commented that *Snowden* will be "one of the last claims" likely to be decided under the former D.C. statute, which has been repealed since 1982 for injured workers in the District of Columbia. (Pet. App. 2a).

For these reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

RICHARD W. GALIHER, JR.
GALIHER, CLARKE & GALIHER
401 E. Jefferson Street, Suite 101
Rockville, MD 20850
(301) 762-2102
Counsel of Record
for Respondent Snowden

APPENDIX

* * *

Government of the District of Columbia
Department of Employment Services

Labor Standards Washington, D.C. 20011
• 1200 Upshur Street, N.W. • Suite 100 •

March 2, 1998

Roger Mackey, Esquire
Conrad A. Fontaine
12701 Fair Lakes Circle, Suite #470
Fairfax, VA. 22033

RE: Florence Snowden v. Washington Hospital Center
OWCP Number: 40-134355
D/A: 08/07/78

Dear Attorney Mackey,

As you are aware the claimant has been awarded permanent total disability benefits which are to be paid by the self-insured employer. Every October 1st of each year the claimant is entitled to a cost-of-living adjustment to be paid by the self-insured employer. The carrier confirmed that as of October 1, 1994 the claimant was paid at the rate of $398.80 per week. Please have the self-insured employer complete the enclosed forms which verify that the claimant has received her annual cost-of-living adjustments for 1995, 1996 and 1997. The forms reflect that the claimant should have been paid as follows:

YEAR	% INCREASE	COMP. RATE
1994	3.06%	$398.80
1995	2.83%	$410.00

1996	2.38%	$420.00
1997	4.33%	$438.00

Please forward the completed LS-521 forms to my office as soon as possible so that I can verify that the claimant is being paid at the correct compensation rate. If you should have any questions or concerns, please do not hesitate to contact me on (202) 576-6265.

Sincerely,

/s/ Lisa Baxter
Lisa Baxter
Claims Examiner
District #40

LAW OFFICES
OF
WILLIAM C.E. ROBINSON
Suite 470
12701 FAIR LAKES CIRCLE
FAIRFAX, VIRGINIA 22033

(**DC*MD+VA)
William C.E. Robinson*+
Sharon M. Chambers**+
Michael V. Durkin**+
Amy L. Epsten**+
Roger S. Mackey**+
Francis O. Warren*+
Rocco P. Porreco**+

(703) 518-6930
FAX (703) 568-3617

June 11, 1998

Lisa Baxter, Claims Examiner
Government of the District of Columbia
Department of Employment Services
Labor Standards
1200 Upshur Street, N.W.
Suite 100
Washington, D.C. 20011

RE:	Named Insured:	Washington Hospital Center
	Claimant:	Florence Snowden
	Claim No.:	F 53 3535398 RG
	OWCP No.:	40134355
	D/A:	8/7/78
	Our File No.:	880026

Dear Ms. Baxter:

This letter will confirm our phone conversation on Thursday, June 11th regarding the above-captioned. It is my

understanding that your Department is taking the position that my client owes cost of living adjustments compounded going back to the date of the accident once the Claimant was awarded permanent and total disability. You are relying upon the cases of *Holliday* vs. *Todd Shipyards Corporation* 654 Fed 2nd 415 13 DRBS 741 5th Circuit 1981 and a D.C. Circuit case interpreting *Holliday* known as *Brandt* vs. *Steidham Tire Company* 785 Fed 2nd 329 18 DRBS 73 (crt) (D.C. Circuit 1986). It is the position of the Employer and Insured that *Phillips* vs. *Marine Concrete Structures, Inc.*, 895 Fed 2nd 1033, 23 DRBS 36 (crt) (5th Circuit 1990) (Enbanc) controls. Phillips reversed Holliday in the 5th Circuit and basically held that cost of living adjustments are calculated from the date of permanent and total forward. As you know, in the Brandt case the D.C. Circuit Court of Appeals stated "in some, we accept the Holliday ruling as the proper reading of the statute in this Circuit *at least until the precedent is overruled in the 5th Circuit.*" As you well know, Holliday was overruled in the 5th Circuit by the Phillips decision.

Most recently, we have the Benefits Review Board decision in *Suzin R. Bailey* vs. *Pepperidge Farm, Inc. and Liberty Mutual*, which as you know is a local Long Shore case. The Benefits Review Board stated unequivocally "therefore, Holliday no longer applies to cases arising under the D.C. act." The original Order in this case awarded the Claimant permanent and total disability effective December 18, 1990 and my client will continue to make permanent and total payments, however, based on the adjustments per Phillips and Baily. Our records show that the Claimant should presently be receiving disability benefits at the rate of Two hundred, thirty-six dollars

($236.00) per week and we intend to make payments accordingly. We will not make payments pursuant to your letter of June 5, 1998 which shows a 1997 compensation rate of Four hundred thirty-eight dollars ($438.00).

Finally, my client has paid disability benefits totaling One hundred ninety three thousand, sixty dollars and ninety-five cents ($193,060.95). Per the enclosed audit sheet, my client's obligation to date is One hundred, sixteen thousand, four hundred thirty-six dollars and sixty-four cents ($116,436.64). We therefore, have overpaid the Claimant Seventy six thousand, six hundred twenty-six dollars and thirty-one cents ($76,626.31). Since these payments were made voluntarily (no Order to pay supplemental allowances) we respectfully request an Order allowing the Employer and Insurer to take a credit pursuant to 36-USC Section 914 (J).

We look forward to hearing from you.

Very truly yours,

/s/ RGM/BSB
Roger S. Mackey

RSM/bsb

cc: Bruce Sackett, Claim Representative
Richard W. Galiher, Jr.

* * *

Government of the District of Columbia
Department of Employment Services

Labor Standards Washington, D.C. 20011
• 1200 Upshur Street, N.W. • Suite 100 •

07 MAR 1996

MEMORANDUM FOR: Joseph F. Olimpio, Director
Longshore and Harbor
Workers' Compensation

FROM: /s/ L.J. Baxter
for Joseph P. Yeldell
Acting District Director

SUBJECT: Case of Florence Snowden vs.
Washington Hospital Center
OWCP File No: 40-134355
Reimbursement to Special Fund

Please be advised that this office has been successful in its attempts to retrieve the monies owed to the Special Fund. Attached is a check for the entire reimbursement amount of $32,077.22.

We will continue to closely monitor this case.

ATTACHMENT

CHECK NO. 5958862Z CD 4

AGENT

053 0000038 053 C 0000000106217 CCA WASH HOSP CENT 6R/ 00 7110

LOSS DATE CHECK DATE

02/28/96

AMOUNT

$32,077.22

THIRTY TWO THOUSAND SEVENTY SEVEN AND 22/100 DOLLARS

SPECIAL FUND REIMBURSEMENT

COLUMBIA BANK OF DELAWARE, N.A.

CC FROM 12/7/1995 THRU 02261996

ORDER OF OFFICE OF WORKERS COMP PROGRAM LONGSHORE & HARBOR W/C DIVISION

DISTRICT 40

1200 U[illegible] STREET NW

WASHINGTON DC 20011

BEST AVAILABLE COPY

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

[SEAL]

BRB No. 97-1156

SUZIN R. BAILEY Claimant-Respondent v. PEPPERIDGE FARM, INCORPORATED and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**PUBLISHED** DATE ISSUED: MAY 19 1998 DECISION and ORDER

Appeal of the Supplementary Compensation Order Awarding 20 Percent Additional Compensation of Charles L. Green, Associate Director, Office of Workers' Compensation Programs, United States Department of Labor.

Donald P. Maiberger (Anderson & Quinn), Rockville, Maryland, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplementary Compensation Order Awarding 20 Percent Additional Compensation (No. 40-170387) of Associate Director Charles L. Green rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501-502 (1973) (the D.C. Act). We must affirm the findings of the district director unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting).

On November 7, 1981, claimant injured her back and leg while working for employer as a manager of a Godiva chocolate store. The work-related injuries caused additional problems to her neck and shoulder, as well as psychiatric problems. On August 14, 1992, Administrative Law Judge Robert S. Amery awarded claimant permanent total disability benefits from December 5, 1989, medical benefits, an assessment pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), and interest. Additionally, the administrative law judge awarded claimant statutory adjustments to her award. Employer had voluntarily paid claimant temporary total disability benefits since approximately April 1982.

In calculating the amount to be paid pursuant to this decision, a dispute arose between employer and the district director in 1996 concerning whether cost-of-living adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f), should be paid in accordance with *Brandt v. Stidham Tire Co.*, 785 F.2d 329, 18 BRBS 73 (CRT) (D.C. Cir. 1986) (adopting the holding in *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981) that the rate paid for permanent total disability should include all intervening Section 10(f) adjustments occurring during periods of prior temporary total disability). On April 1, 1996, the district director advised employer to pay Section 10(f) annual adjustments for claimant's permanent total disability benefits effective October 1, 1994, and October 1, 1995. These annual adjustments were computed in accordance with *Holliday*. In August 1996, a claims examiner informed employer's attorney by letter that *Holliday* is applicable in cases arising under the D. C. Act and that employer accordingly should adjust claimant's compensation rate to reflect the holding in *Holliday*. If employer did not agree with the district director's position, it was advised to contact Joseph Olimpio, Director of the Longshore and Harbor Workers' Compensation Division of the United States Department of Labor. On September 5, 1996, employer contacted Mr. Olimpio by letter and requested that the Office of Workers' Compensation Programs no longer follow the *Holliday* decision because it had been overruled by the Fifth Circuit. *See Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990) (*en banc*). Mr. Olimpio responded to employer's letter on February 12, 1997,

advising employer that the Office of Workers' Compensation Programs would continue to follow the *Holliday* formula in cases arising under the D.C. Act until the United States Court of Appeals for the District of Columbia Circuit overruled *Brandt*. Subsequently, on June 2, 1997, a claims examiner advised employer by letter that an employer failed to pay the correct amount based on *Holliday*, an assessment pursuant to Section 14(f) of the Act, 33 U.S.C. §914(f), would be entered.

On June 3, 1997, the district director issued a supplementary order awarding a 20 percent assessment pursuant to Section 14(f) as employer failed to pay claimant her annual adjustments pursuant to Section 10(f) in accordance with *Holliday*.[1] The district director denied employer's motion for reconsideration in which employer asserted that the district director should not follow *Holliday* as it had been overruled by *Phillips*.

On appeal, employer challenges the district director's Supplementary Compensation Order awarding a Section 14(f) assessment on the ground that the Section 10(f) computations are incorrect as a matter of law.[2] Neither

---

[1] Section 14(f) provides that compensation payable under the terms of an award must be paid within 10 days after it is due; if it is not timely paid employer is liable for an assessment in the amount of 20 percent of the unpaid compensation. As claimant should have received $143,340.05 from employer based on *Holliday* but only received $120,379.61, a difference of $22,960.44, the district director ordered employer to pay the 20 percent Section 14(f) assessment in the amount of $4,592.08.

[2] By Order dated July 7, 1997, employer's motion for a stay of payments was denied, and employer was directed to notify the Board whether it had paid the amount due under the terms

claimant nor the Director, Office of Workers' Compensation Programs (the Director), has filed a response brief.

Initially, we hold that due process requires that we decide the Section 10(f) issue raised by this appeal. Ordinarily, an employer may not collaterally attack an underlying compensation award through an appeal of a Section 14 penalty. *See, e.g., Abbott v. Louisiana Ins. Guaranty Ass'n*, 889 F.2d 626, 23 BRBS 3 (CRT) (5th Cir. 1989), *cert. denied*, 494 U.S. 1082 (1990) (enforcement proceeding under Section 18(a) limited to lawfulness of the supplemental order of default and does not include the substantive correctness of the underlying compensation order); *Brown*, 30 BRBS at 29 (dealing with timeliness of employer's payment). After our review of the procedural history of this case, however, it is apparent that employer had no earlier opportunity to challenge the basis underlying the district director's Section 14(f) assessment, *i.e.*, the computation of the Section 10(f) adjustment pursuant to *Holliday*. *See generally Bray v. Director, OWCP*, 664 F.2d 1045, 14 BRBS 341 (5th Cir. 1981) (Board has jurisdiction to hear appeal raising issue of underlying law or fact where district director finds default inappropriate order); *Kelley v.*

---

of the district director's order. Employer notified the Board by letter dated July 31, 1997, that it has paid the assessment pursuant to Section 14(f) in accordance with the district director's order. As employer paid claimant the amount owed under the terms of the district director's order, the Board has jurisdiction to review the imposition of the Section 14(f) assessment. *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1 (CRT) (3d Cir. 1994), *aff'g* 27 BRBS 260 (1993); *see also Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 17 BRBS 135 (CRT) (9th Cir. 1985); *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 16 BRBS 10 (CRT) (5th Cir. 1983).

Bureau of National Affairs, 20 BRBS 159 (1988). The administrative law judge did not specifically order the calculation of Section 10(f) adjustments pursuant to *Brandt/Holliday*, and the district director did not issue any compensation orders concerning Section 10(f) prior to the assessment of the Section 14(f) penalty. Thus, this appeal presents the earliest opportunity for employer to challenge the Section 10(f) calculation. Moreover, no party challenges the propriety of employer's appeal, which involves strictly a legal issue. *See Brown*, 30 BRBS at 29.

Next, we address employer's contention that the district director erred in awarding the Section 14(f) assessment because employer failed to pay claimant's Section 10(f) annual adjustments to claimant's permanent total disability benefits in accordance with *Holliday*.[3] Employer contends that the United States Court of Appeals for the District of Columbia Circuit only conditionally accepted *Holliday* in its decision in *Brandt*, and as *Holliday* was overruled by *Phillips* in the Fifth Circuit, the district director should no longer apply *Holliday* to cases arising under the D.C. Act.

---

[3] Despite employer's contention to the contrary, the district director had authority to award a Section 14(f) assessment in this case involving no dispute as to the facts but only a legal dispute concerning the applicability of *Holliday* to this case. *Patterson v. Tidelands Marine Service*, 15 BRBS 65 (1982), *rev'd on other grounds sub nom. Tidelands Marine Service v. Patterson*, 719 F.3d 126, 16 BRBS 10 (CRT) (5th Cir. 1983).

Section 10(f) provides in relevant part:

> Effective October 1 of each year, the compensation . . . payable for permanent total disability . . . arising out of injuries sustained after October 27, 1972, shall be increased by a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under Section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1.

33 U.S.C. §910(f) (1982).[4] In *Holliday*, the Fifth Circuit adopted the Director's method for computing permanent total disability benefits and held that claimants, upon becoming permanently totally disabled, are entitled to intervening percentage increases reflecting annual cost-of-living adjustments pursuant to Section 10(f) that accrued during any earlier period of temporary total disability. *Holliday*, 654 F.2d at 417, 421-423, 13 BRBS at 741-742, 746-747. The District of Columbia Circuit in *Brandt* accepted the *Holliday* ruling as the proper reading of the statute in that circuit *"at least until the precedent is overruled in the Fifth Circuit*, or the Director publicly announces that, prospectively, he will seek to apply this current interpretation evenhandedly to all similarly disabled claimants in all circuits." *Brandt*, 785 F.2d at 332, 18

---

[4] In 1984, Section 10(f) was amended to add a five percent cap on annual adjustments. The five percent cap is inapplicable to this case as the 1984 amendments to the Act do not apply to cases arising under the 1928 District of Columbia Act. *See Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

BRBS at 78 (CRT) (emphasis added). The court in *Brandt* was reluctant to reject *Holliday* and therefore create a split in the circuits. *Id.*, 785 F.2d at 332, 18 BRBS at 77 (CRT). Moreover, in *Brandt*, the court was displeased with the way the Director was challenging the holding in *Holliday* in every circuit except the Fifth Circuit, the circuit in which the Director had rendered his "allegedly incorrect interpretation." *Id.*, 785 F.2d at 332, 18 BRBS at 77 (CRT).

Subsequently, in *Phillips*, 895 F.2d at 1033, 23 BRBS at 36 (CRT), the Fifth Circuit, sitting *en banc*, overruled its decision in *Holliday* and held that claimants are not entitled to Section 10(f) annual adjustments during previous periods of temporary total disability. In overruling *Holliday*, the Fifth Circuit in *Phillips* concluded that the language of Section 10(f) is plain and unambiguous that the annual adjustments are to be paid only to permanent total disability benefits. *Phillips*, 895 F.2d at 1035, 23 BRBS at 38 (CRT). Moreover, although the court stated that resort to legislative history is unnecessary "where the statute is so lucid," it nonetheless noted that, with regard to Section 10(f), Congress intended to provide for upgrading benefits in future years in cases of permanent total disability and had rejected a version of Section 10(f) providing for annual adjustments to all compensation, whether partial or total, temporary or permanent. *Phillips*, 895 F.2d at 1035 n. 3, 23 BRBS at 38 n. 3 (CRT). Consequently, the court overruled *Holliday* and adopted the new position of the Director that there shall be no Section 10(f) adjustments for periods of temporary total disability, adding that this position was the posture taken by the Board,

except in cases arising in the Fifth and District of Columbia Circuits.[5] *Phillips*, 895 F.2d at 1035, 23 BRBS at 38 (CRT); *see, e.g., Scott v. Lockhead Shipbuilding & Const. Co.*, 18 BRBS 246 (1986). The United States Courts of Appeals for the Second and Ninth Circuits have subsequently adopted the holding in *Phillips*.[6] *Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9 (CRT) (9th Cir. 1990); *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990).

After a review of the relevant case law since *Holliday* as set out above, we agree with employer that the district director erred in awarding a Section 14(f) assessment based on employer's failure to pay claimant annual adjustments pursuant to Section 10(f) in accordance with *Holliday*. In *Branch*, the District of Columbia Circuit stated, "In sum, we accept the Holliday ruling as the proper reading of the statute in this circuit *at least until*

---

[5] In fairness to the *Holliday* court, the court in *Phillips* noted that the construction of Section 10(f) was not presented by the parties in an adversarial context but as a settlement and that Director acknowledged that his attorney erred in representing the Director's purported position to the court. *Phillips*, 895 F.2d at 1035 n. 4, 23 BRBS at 38 n. 4 (CRT).

[6] The Eleventh Circuit still adheres to *Holliday*. In *Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989), the court stated it is bound by all decisions issued by the Fifth Circuit prior to October 1, 1981, when the Eleventh Circuit was created, unless the Eleventh Circuit, in an *en banc* decision, overrules the precedent. Recently, the Eleventh Circuit reaffirmed this position, and declined to grant rehearing *en banc* on this issue. *Southeastern Maritime Co. v. Brown*, 121 F.3d 648, 31 BRBS 140 (CRT) (11th Cir. 1997), *pet. for cert. filed*, ___ U.S.L.W. ___ (U.S. Feb. 24, 1998) (No. 97-1394).

the precedent is overruled in the Fifth Circuit,. . . . " Brandt, 785 F.2d at 332, 18 BRBS at 78 (CRT) (emphasis added). Contrary to the district director's order, the *Brandt* court did not state that it would follow *Holliday* until the District of Columbia Circuit overruled it. Rather, the court stated that it would follow *Holliday* until it was overruled by the Fifth Circuit. As *Holliday* has been overruled by *Phillips* in the Fifth Circuit, the condition precedent set by the court has been satisfied. Therefore, *Holliday* no longer applies to cases arising under the D.C. Act. Claimant is entitled to annual adjustments pursuant to Section 10(f) at a rate including only those adjustments occurring after she became permanently totally disabled. Consequently, the district director's order of a Section 14(f) assessment based on employer's failure to pay annual adjustments pursuant to Section 10(f) in accordance with *Holliday* is reversed.

Accordingly, the Associate Director's Supplementary Compensation Order Awarding 20 Percent Additional Compensation is reversed.

SO ORDERED.

/s/ Betty Jean Hall
BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals Judge

* * *

Government of the District of Columbia
Department of Employment Services

Labor Standards Washington, D.C. 20011
• 1200 Upshur Street, N.W. • Suite 100 •

APR 27 1992

MEMORANDUM TO: Joseph F. Olimpio, Director
Longshore and Harbor
Workers' Compensation

FROM: /s/ Ron Wilson Selani
for Maria Borrero
District Director

SUBJECT: Payments from Special Fund for Permanent Total Disability Benefits in accordance with the Decision and Order issued by Administrative Law Judge Charles A. Rippey dated March 18, 1992.
Case of Florence Snowden
OWCP File No: 40-134355

This case is referred to your office for payment of permanent total disability benefits in accordance with the Decision and Order issued by Administrative Law Judge Charles A. Rippey Dated March 18, 1992.

The attached chart outlines compensation payment by Washington Hospital Center/Aetna Casualty & Surety

Company for temporary total disability benefits beginning September 7, 1978 through December 17, 1990, thereafter, employer/carrier is responsible for 104 weeks of permanent total disability benefits beginning December 18, 1990 through December 14, 1992, compensation thereafter to be paid from the Special Fund created under Section 44 of the Act.

MB/md

Average Weekly Wage: $299.20 Compensation Rate: $192.00

Payment Due in the Case of: Florence Snowden

OWCP NO: 40-136355

Payments due to the claimant in accordance with the Decision and Order issued by Administrative Law Judge Charles A. Rippe dated March 10, 1992.

Disability Type	Payable By	From	To	Base Rate	Section 10(f) Increase	Holiday Rate	Compensation Rate	Weeks	Due by Carrier
TTD	CARRIER	09-07-78	09-30-78	$192.80	-0-		$192.80	3 3/7	$ 641.02
TTD	CARRIER	10-01-78	09-30-79	$192.80	$16.00(8.05%)	*$208.80	$192.80	52 1/7	$10,053.14
TTD	CARRIER	10-01-79	09-30-80	$208.80	$16.00(7.63%)	*$224.80	$192.80	52 1/7	$10,080.68
TTD	CARRIER	10-01-80	09-30-81	$224.80	$16.00(7.03%)	*$240.80	$192.80	52 1/7	$10,053.14
TTD	CARRIER	10-01-81	09-30-82	$240.80	$21.00(8.87%)	*$261.80	$192.80	52 1/7	$10,053.14
TTD	CARRIER	10-01-82	09-30-83	$261.80	$15.00(5.68%)	*$276.80	$192.80	52 1/7	$10,053.14
TTD	CARRIER	10-01-83	09-30-84	$276.88	$12.00(4.51%)	^$288.80	$192.80	52 1/7	$10,080.68
TTD	CARRIER	10-01-84	09-30-85	$288.80	$16.00(5.71%)	*$304.80	$192.80	52 1/7	$10,053.14
TTD	CARRIER	10-01-85	09-30-86	$304.80	$ 8.00(2.69%)	^$312.80	$192.80	52 1/7	$10,053.14
TTD	CARRIER	10-01-86	09-30-87	$312.80	$ 5.00(1.69%)	^$317.80	$192.80	52 1/7	$10,053.14
TTD	CARRIER	10-01-87	09-30-88	$317.80	$ 6.00(1.93%)	^$323.80	$192.80	52 1/7	$10,080.68
TTD	CARRIER	10-01-88	09-30-89	$323.80	$10.00(3.13%)	^$333.80	$192.80	52 1/7	$10,053.14
TTD	CARRIER	10-01-89	09-30-90	$333.80	$13.00(3.83%)	^$346.80	$192.80	52 1/7	$10,053.14
TTD	CARRIER	10-01-90	09-30-90	$346.80	$11.00(3.26%)	^$357.80	$192.80	11 1/7	$ 2,148.34
PTD	*CARRIER	12-16-90	09-30-91	$357.80	-0-	-0-	$357.80	41	$14,669.80
PTD	CARRIER	10-01-91	09-30-92	$357.80	$ 7.00(2.61%)	*$366.80	$366.80	52 1/7	$19,178.40
PTD	*CARRIER	10-01-92	12-16-92	*Unable to compute at this time because we do not know cola for 10-1-92.					

*These Benefits due the claimant were computed in accordance with the Holiday Decision, therefore the claimant is not entitled to an anual cost of living adjustment until December 16, 1990, which is the date the claimant was found to be permanently and totaly disabled.

^On December 15, 1992, the Special Fund shall commence paying Permanent

BEST AVAILABLE COPY